promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.[17]

Given the lack of any intent by Congress to authorize takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has had an opportunity to address such issues, the Commission cannot subject the Government to liability for compensation by promulgating rules that would effect such a taking.

V. MANDATING NONDISCRIMINATORY ACCESS CREATES GREAT PRACTICAL PROBLEMS AND IMPOSES ENORMOUS POTENTIAL LIABILITY ON LOCAL GOVERNMENTS.

Mandating that local governments provide nondiscriminatory access to their property by telecommunications providers would create great practical problems and impose enormous potential liability on local governments by preventing them from controlling access to their properties. Local governments, as building owners and managers, have a great many responsibilities that can only be met if they can control access to their properties, including compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and service providers; and managing limited physical space. For the Commission to limit this control would unfairly increase the local governments' exposure to liability and would adversely affect public safety.

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[17] For a more extensive discussion of Congressional intent regarding forced access, *see* Comments of Real Access Alliance at 41-42.

A. The Unnecessary Regulation Proposed in the NPRM Would Harm the Interests of Building Owners and Tenants, Residents, And the Public at Large that Depend Upon the Safe and Efficient Management of Buildings.

Building owners and managers, including local governments, are ultimately responsible for the safety, security and efficient operation of their buildings. For example, the responsibility for enforcement of fire and safety codes rests first and foremost with the building owner and manager. However, building owners and managers cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. Building operators must also be concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations.

Currently, as a primary means of ensuring that its responsibilities in regard to safety codes and other security matters are met, a building owner or manager may restrict access to qualified persons. The owner or manager may also seek recourse, if necessary, by withholding payment or denying future access. Since technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities, it is essential that building owners and managers continue to have control over such access to their property, as well as the ability to continue to ensure in the future that any work done in a building is done in a manner that does not compromise essential systems, including fire protection features, as well as the general safety and welfare of the others who have a right to use or occupy the property.

In addition to its role in ensuring the safety and security of the building, the building owner or manager is in the best position to coordinate the conflicting needs of multiple tenants

or residents and multiple service providers, while managing the building's finite amount of physical space in which telecommunications facilities can be installed. A building owner must have control over the space occupied by telephone lines and facilities, especially in a multi-occupant building, because only the owner or manager can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. For example, allowing a large number of competing providers access to a building raises the concern that service providers may damage the facilities of tenants and of other providers in the course of installation and maintenance. If building management cannot take reasonable steps to prevent or (after the fact) mitigate such damage, building operators and tenants will suffer financial losses and increased disruption of their activities. Consequently, building operators must retain a free hand to deal with service providers based upon each provider's behavior. If one company consistently performs sloppy work that adversely affects others in the building, the building owner should have the right to prohibit that company from installing facilities in the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue or legal liability because of actions it cannot control.

For these reasons, it is impracticable for the Commission to develop sweeping, nationwide rules that will adequately address all the different situations that arise every day in hundreds of thousands of buildings across the country. There is simply no substitute for allowing building owners to negotiate individually with service providers and tailor the rights and remedies of the parties to the specific situation. In order to negotiate individually with service providers, building owners and managers must have the ability to continue to control access to their property.

B. Local Governments' Buildings and Facilities Have Unique Characteristics That Intensify the Problems Discussed by the Private Building Owners.

As noted above, local governments' buildings have unique features presenting special problems that must be dealt with over and above industry-wide rules. For example, local governments are more likely than private building owners to use those specific areas and properties to which telecommunications service providers may seek access, because local governments use these areas for public safety purposes (among other things). Local governments, among other things, must install emergency dispatching networks and radio communications systems for emergency repair crews on highways and the like. Given the importance of such public safety services, local governments must have the authority to preclude the installation of facilities that could interfere with the public service functions of the existing facilities.

In addition, since many government facilities are constructed out of public necessity, local governments can site them in areas of a community where private companies cannot. For example, it may be necessary to place a water tower in a residential area where a commercial establishment would be prohibited. While a local government may out of necessity make such a placement, it should not be required to compound the intrusion into the neighborhood by adding equipment cages or sheds to support "piggybacked" telecommunications facilities. These buildings may be obtrusive enough as it is. To make them more so by opening these areas up to unlimited additional telecommunications equipment would abuse local government authority by parlaying a minimal, necessary intrusion into a business opportunity for providers.

Furthermore, the manner in which telecommunications providers can gain access to local government sites may be quite different than for other non-governmental buildings. For

example, public safety communications facilities must be *secure* against disruption or interference. Such differences may affect how installation work is scheduled, how the actual equipment is installed, and even what equipment may be installed.

VI. IMPOSING A NONDISCRIMINATION REQUIREMENT ON BUILDING OWNERS IN THE NAME OF EXTENDING SERVICE TO TENANTS WOULD BE INEQUITABLE, BECAUSE CLECS ARE FREE TO DISCRIMINATE AGAINST TENANTS.

CLECs argue, in essence, that they should be permitted to impose an obligation on building owners without assuming any obligation of their own. According to the CLECs, it is acceptable for them to discriminate – they can decide not to serve a person even if a potential subscriber requests service, and they can choose not to install their facilities in a building, even if the owner invites them to come in. Yet the CLECs argue that it is not acceptable for building owners to discriminate among providers.[18] This is unreasonable and inequitable.

In fact, any person who operates a business can see why a CLEC would want to have the ability to choose its customers. In many cases it may not be economical for a CLEC to extend its facilities to adjacent buildings. The size and design, the likely needs of prospective subscribers in the building, the presence of multiple competitors in the building, and other factors may indicate that the provider will not recover the cost of extending service within a reasonable time. The same may even be true of a potential customer in a building that is already being served. Local governments understand this type of economic constraint because similar issues arise when considering how many providers an owner should allow into a

building, and what costs the presence of each provider is likely to impose on the owner. There is no reason, however, to hold building owners – including local governments – to a different standard than the providers themselves.

VII. THE FCC MAY NOT, UNDER THE ACT, EXTEND ITS RULES FOR VIDEO RECEIVE ANTENNAS TO ENCOMPASS TELECOMMUNICATIONS ANTENNAS.

A. The Commission Lacks Authority To Extend Its Video Receive Antenna Rules To Telecommunication Antennas.

The NPRM casually suggests that the Commission could extend to telecommunications facilities (transmit/receive antennas) the drastic preemption it has applied to video receive antennas.[19] Such a suggestion is directly contrary to the Commission's congressional mandate.

The Telecommunications Act of 1996 strictly distinguishes these two types of antennas. Section 207, upon which the Commission premised its sweeping preemption of local rules, is confined to "devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." In sharp contrast, Section 704(a), amending 47 U.S.C. § 332(c), expressly preserves local governments' authority over telecommunications antennas: with four exceptions specified in the statute, "nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." This affirmative statement, evincing the

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[18] *See e.g.,* Comments of Winstar Communications, Inc., In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 and CC Docket No. 95-185, filed May 26, 1999.

intent of Congress to *preserve* local authority over such facilities, prevents the Commission from adopting rules for telecommunications antennas similar to those it adopted for video receive antennas. In fact, the Commission itself has recognized that it lacks such authority.[20]

Moreover, the Act contains a provision generally prohibiting a preemptive reading unless preemption is explicitly required by the Act:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[21]

Thus, the NPRM cannot pretend to rely on an implied authority to preempt under the Act at all – much less in the teeth of the contrary provision of § 704.[22]

For the NPRM to advance such an approach, which is flatly contrary to the Act, is troubling in itself. It suggests a narrowness of focus that loses track of express statutory limitations on the Commission's authority in its rush to make all other considerations

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[19] NPRM at ¶ 69.

[20] *See* William E. Kennard, "A New FCC for the 21st Century" (August 1999), Appendix D at 38, item 10 (requesting congressional authority for the Commission "to extend protection over broadband transmit/receive antennas"). If the Commission already had authority to take such steps, it would not need additional legislation for that purpose.

In making this distinction, we do not concede that the Commission's rules under § 207 are lawful, but rather point out that even on that assumption, such rules cannot be extended to § 704 devices.

[21] Telecommunications Act of 1996 at § 601(c)(1).

[22] To the extent that the analysis of the *OTARD Second Report and Order* is valid, *Restrictions of Over-the-Air Reception Devices*, CS Docket no. 96-83, Second Report and Order, FCC 98-273, 13 FCC Rcd at 23883-88, ¶¶ 19-28 (1998), it applies only to devices placed by *tenants* in a leasehold within the normal sphere of such a tenant's control, such as a "rabbit ears" antenna. Such a tenant is not necessarily authorized to break through walls, install in-wall wiring, or occupy utility easements or other parts of the building not included in

secondary to advancing the business interests of telecommunications providers. While these interests are legitimate and should be promoted, this must proceed in the context of other, equally valid concerns, such as those of property rights. Congress did not set up a regime in which a telecommunications use automatically "trumps" any other aspect of private property ownership. Rather, it assumed that the Commission, as guardian of the public interest, would appropriately balance the promotion of telecommunications services with other concerns. It is imperative that this principle be kept clearly in mind in this proceeding.

B. The Proposed Preemptive Regime Is Unnecessary and Inappropriate.

Even if the Commission were empowered to extend federal controls into this area, it would be unnecessary and inappropriate to do so. The record does not show that wireless providers are meeting with widespread problems in arranging for tower sites. On the contrary, despite the anecdotes confided to the Commission by advocates of federal preemption, the growth of new and existing wireless systems over the past three years indicates that local communities are successfully working out these matters with telecommunications providers, by and large. Of course, it would no doubt be simpler and cheaper for such providers if they could simply go ahead and erect towers without having to obtain anyone's consent – but this does not by itself justify riding roughshod over all other rights and interests.

It should be noted that the federal courts of appeal are increasingly recognizing local communities' proper interests in matters of safety, visual impact, and community integrity in planning to accommodate wireless antennas. The recent decisions in the Fourth and Seventh Circuits, *Virginia Beach* and *Aegerter*, both point to the validity of local concerns when fairly

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the leasehold. As noted above, the specific rights of tenants and landlords in these respects are

applied to telecommunications site applications.[23] The procedural protections already incorporated in § 332(c) ensure that such concerns must be clearly stated and subject to judicial review. It has not been shown that the NPRM's proposed further step – a radical intrusion into normal zoning and planning processes – is needed.

Moreover, a facile analogy between video receive antennas and telecommunications antennas is inappropriate. Satellite dishes less than one meter in size are relatively unobtrusive compared to the hundred-foot monopoles and lattice towers used by wireless carriers. These larger towers bring with them safety issues (such as potential tower collapse) and visual blight on a much larger scale than do the small dishes. Even assuming that the sweeping preemptive scheme of § 1.4000 is appropriate for smaller antennas, its effects would be very different and more intrusive if applied to telecommunications antennas.

Further, there is much *less* reason to apply such a Draconian preemptive regime to cellular and PCS antennas than to video receive antennas. This is because most of the latter belong to individual consumers, whose reception depends on that one antenna and single site. If a homeowner cannot put up a receive antenna in or around the home, that homeowner will not be able to receive the transmission at all. But the same is not true of a telecommunications provider looking for an antenna site. There are likely to be many possible sites for an antenna to fill a gap in a coverage area, and many possible layouts for a set of such antennas to cover that area. This is why many disputes about tower siting in fact resolve themselves into disputes about whether the provider has examined possible alternative sites. Because a

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determined by state law. *See also* section IV.A herein.

[23] *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998); *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999).

wireless provider typically has more than one way of achieving its desired coverage, a denial of permission for one tower site does not deprive the company of all opportunity for that coverage. In fact, communities around the country are now working with wireless providers to find such alternatives, since they too have an interest in full coverage for their citizens.

The extension of federal preemption proposed in the NPRM is both legally and practically ill-considered. It should be rejected.

VIII. OTHER ISSUES MUST BE HANDLED IN A WAY CONSISTENT WITH PROPERTY RIGHTS.

A. A Commission Rule Requiring LECs To Provide House and Riser Cable As Unbundled Network Elements Cannot Be Construed As Creating a Right of Physical Access.

The NPRM raises a number of issues regarding access to unbundled network elements. We do not dispute the Commission's authority to consider whether wiring that is owned by ILEC's and located inside buildings should be made available to competitors as an unbundled network element ("UNE"). However, we would object to any possible application of the Commission's authority that might be construed as creating a right of physical access to the building. For example, we would object to a Commission ruling requiring the provision of inside wiring as an UNE if the ruling were held to allow a carrier to install its facilities in a building to reach the Network Interface Device and make cross-connections to wiring that was purchased as a UNE. Nor does the Commission have the underlying authority to permit entry

in that fashion, as discussed above.[24] Therefore, any decision to include inside wiring as a UNE must respect the property rights of building owners.

B. The Commission's Definition of the Demarcation Point Should Preserve Flexibility and Property Rights.

With respect to the location of the demarcation point, most property owners benefit from the flexibility of the current system, which allows them to move the demarcation point to a place of their choosing if a carrier does not establish it at the minimum point of entry ("MPOE"), and the wiring was installed or substantially altered after August 1990. All property owners should have the right to establish the demarcation point at a place of their choosing if a carrier does not establish it at the MPOE. Consequently, there is no need to establish a single demarcation point at the MPOE or anywhere else. The Commission should not attempt to establish a fixed demarcation point at each tenant's premises, especially if this were to be combined with any right of entry up to the demarcation point.

Finally, the Commission lacks authority to establish a demarcation point at any point beyond the termination of facilities owned by a telecommunications provider. To the extent that a building owner has installed its own wiring, or acquired wiring from a carrier, that wiring is no longer the property of a regulated entity, and is consequently outside the Commission's jurisdiction.

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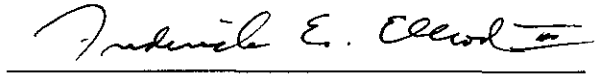
[24] Certainly in those cases in which a building owner indisputably owns the wiring, declaring wiring to be a UNE would not obligate the building owner to make it available, because building owners are not subject to Section 251 of the Act.

IX. CONCLUSION

For the foregoing reasons, the Commission should not require forced access to local government property by telecommunications providers.

Respectfully submitted,



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